Supreme Court, U.S.
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NO. 95-1464

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SARA B. HAZEN, *Petitioner,*
v.
EVELYN B. COOPER, ET AL., *Respondents.*

On Petition for Writ of Certiorari to
The Court of Appeals for The Fourteenth
Supreme Judicial District of Texas

BRIEF IN OPPOSITION OF RESPONDENTS LIDDELL, SAPP, ZIVLEY, & LaBOON, BRUCE LaBOON and ROBERT BROWN

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ROBERT BROWN

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LIST OF ALL PARTIES

Petitioner:

SARA B. HAZEN, Individually and as Temporary Administrator of the Estate of Rose D. Bashara, Deceased

Respondents:

LIDDELL, SAPP, ZIVLEY AND LABOON

EVELYN B. COOPER, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust

MELBURN G. COOPER, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust

ISABELL TRADD, Individually and as Guardian of Rose D. Bashara, N.C.M.

EVELYN B. COOPER and MELBURN G. COOPER TRUST

WILLIAM AMAIMO, Individually and as Guardian of the Estate of Rose D. Bashara, N.C.M.

FIRST CITY NATIONAL BANK now FEDERAL DEPOSIT INSURANCE CORPORATION

AMERICAN BANK AND TRUST

BRUCE LABOON

ROBERT BROWN

GRACE GREENE

EARNEST G. CALDWELL

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TO THE HONORABLE SUPREME COURT:

Respondents, Liddell, Sapp, Zivley and LaBoon, Bruce LaBoon and Robert Brown (collectively "Liddell, Sapp") respectfully submit this Brief in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Question Presented No. 1

> The Texas Courts, as a matter of state law, found that after six years of unexcused inaction, the case was properly dismissed for

want of prosecution, an issue that does not implicate Petitioner's claimed right to federal due process. Petitioner's claims are either harmless error, at most, or were waived.

Question Presented No. 2

The Texas Courts correctly found that the refusal of the independent tribunal to recuse the trial judge for his previous receipt of minor campaign contributions over a period of several years did not deny Petitioner's right to a fair and unbiased hearing.

STATEMENT OF THE CASE

This case was on file for almost six and one-half years when it was dismissed for want of prosecution by the trial court. During those six and one-half years, the Plaintiff and Petitioner, Sara B. Hazen ("Hazen"), did nothing to pursue her assertions in this case--she instituted no formal discovery, filed no motions of any sort, and obtained no trial settings. No trial setting was even requested by Petitioner. Under well-established Texas law the case was properly dismissed for want of prosecution.

After her case had been dismissed, Hazen for the first time raised a complaint that the trial judge had previously,

over a period of several years, received small campaign contributions from lawyers involved in this case. An independent judge was appointed to hear Hazen's recusal motion. The resulting decision that the trial judge was not biased against Hazen was subsequently reviewed and approved by two levels of unbiased appellate courts. No evidence exists that Hazen's right to a fair and unbiased hearing has been denied.

STATEMENT OF FACTS

Hazen and Respondents Isabell Tradd and Evelyn B. Cooper are the daughters of Sam and Rose Bashara, both deceased. Respondents, Liddell, Sapp, acted as attorneys for Sam and Rose Bashara during their lifetime. Rose Bashara died in 1984. While probate of her will was pending, Hazen sought to be and was appointed temporary administrator. In 1987, Hazen filed the original petition in this case alleging that Respondents and others had engaged in a scheme to gain control of real and personal property through deceit, coercion, duress, fraud, undue influence and failure of

consideration. The trial court allowed Hazen to file suit as temporary administrator, but with the following limitation of prosecution of this suit:

> Sara B. Hazen shall not have the authority to prosecute said suits further, to obtain discovery, or to take any other action whatsoever without express subsequent consent of this Court.

It is undisputed that Hazen never requested permission from the Court to prosecute the suit she filed. As a result, there was no formal action in the case for over six and one-half years. After Respondents successfully moved to dismiss the case for want of prosecution, Hazen claimed that she had done some "informal" discovery, allegedly consisting of private investigation by her attorneys. Hazen never offered an excuse for her lack of formal discovery or any other activity in the case.

ARGUMENT

Question Presented No. 1

> The Texas Courts, as a matter of state law, found that after six years of unexcused inaction, the case was properly dismissed for

> want of prosecution, an issue that does not implicate Petitioner's claimed right to federal due process. Petitioner's claims are either harmless error, at most, or were waived.

The Texas courts held, as a matter of state law, that after six and one-half years, Hazen had received more than ample opportunity to prosecute this suit. The factors Texas courts consider in deciding whether to dismiss a case are (1) the length of time the case has been on file; (2) the extent of activity reflected in the case; (3) whether a trial setting had been requested; and (4) the existence of reasonable excuse for the delay. *City of Houston v. Malone*, 828 S.W.2d 567, 568 (Tex. App.--Houston [14th Dist.] 1992, no writ). In this case, Petitioner's suit had been on file for over six and one-half years without any significant activity. Hazen never requested a trial setting and never offered any reasonable excuse for her inactivity and delay. Accordingly, the Texas Appellate Courts held that the case had been properly dismissed for want of prosecution. Hazen does not now challenge the correctness of that decision under Texas law,

nor could she appropriately, for the question raises no issue of federal concern.

Hazen's due process claim was suggested only after her case was dismissed for want of prosecution and she moved for the first time to recuse the trial judge who had dismissed the case. Appropriately under Texas procedure, Hazen's motion for recusal was heard by an independent judge, who had no connection with the case. The independent judge found the recusal motion to be without merit. The entire case was then appealed to the Texas Court of Appeals, which upheld the trial court's dismissal of the case and the independent judge's decision that recusal of the trial judge had not been warranted. Hazen's subsequent appeal to the Texas Supreme Court was denied, as was her motion for rehearing in that court.

In this Petition for Writ of Certiorari, Hazen complains only of a failure to recuse the trial court after the motion to dismiss had been granted, where the motion to dismiss was properly decided under state law. As a result,

any asserted failure of the trial court to have been recused under the circumstances is harmless error. *See generally*, 28 U.S.C. §2111.

Hazen has never explained why she delayed in reviewing the public records on the trial judge's campaign financing until after the case had been dismissed. The public records of the contributions about which she now complains were several years old at the time Petitioner got around to examining them. That Petitioner failed to look at these public records until the case had been on file for over six years shows the insignificance of the issue both in her mind and in the mind of any reasonable person. Such an unreasonable delay amounts to a waiver of Plaintiff's claim. *Cf.* Canon 3(D), ABA Code of Judicial Conduct. (Even a judge's insubstantial financial interest in a party may be waived.)

QUESTION PRESENTED NO. 2

The Texas Courts correctly found that the refusal of the independent tribunal to recuse the trial judge for his previous receipt of

minor campaign contributions over a period of several years did not deny Petitioner's right to a fair and unbiased hearing.

Hazen complains that previously some of the Respondents had made small contributions to the trial judge's judicial election campaign over a period of several years. Hazen argues that those historical and minor contributions alone establish such an appearance of impropriety that recusal would be required without any further showing. This is not an issue that federal courts have been called on to address, since federal judges are not elected and do not receive campaign contributions. As a result, the general pronouncements found in federal case law dealing with an "appearance of impropriety" do not even speak to the issue of nominal campaign contributions.

The wheels of justice in a state with elected judges would obviously grind to a halt if no judge was entitled to consider and rule in a case in which any of the parties or attorneys had contributed to the judge's campaign. As long as judges in Texas and other states must run for judicial

office and conduct privately financed campaigns, such contributions must and will be made by a variety of parties. What is unusual about the present case is that no individual, entity or group is alleged to have contributed any material sum to the campaign. By Hazen's own calculations, Liddell, Sapp and its attorneys gave a total of $2,269. Sewell & Riggs or its attorneys gave a total $700. First City Bank gave a total of $750. Thus, the parties or their counsel gave a total of less than $4,000 to the trial judge.[1] *Compare*, *Texaco v. Pennzoil Co.*, 729 S.W.2d 768, 844-45 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.) ($10,000 contribution by lead attorney); *River Road Neighborhood v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex. App.--San Antonio, 1984, no writ) (parties had contributed 21.7% and 17.1% of all contributions to two judges.).

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[1] For some reason, Hazen calculates the $1,000 given by Julius Glickman in the total given by the parties or their attorneys. Glickman was appointed by the trial court as a predecessor temporary administrator of the estate. He was never a party nor was he an attorney for any of the parties.

Hazen did not feel the issue was of sufficient importance to warrant investigation for over six years. After the case was dismissed, she decided the trial judge must have been biased against her. The comments of Texas Supreme Court Justice Gonzales on allegations of bias which only surface after an adverse ruling, are particularly appropriate:

> Significantly, the Court of Appeals affirmed [the] judgment.... Are we now to question the impartiality of the Chief Justice of that Court who authored its opinion, or the two other Justices of that Court who joined with him to make the opinion unanimous?

Sun Exploration and Production Co. v. Jackson, 783 S.W.2d 202, 207 (Tex. 1989) (J. Gonzales concurring). Must this Court also presume that Chief Justice Brown and Justices Murphy and Ellis of the Texas Court of Appeals were biased against Hazen? The Texas Supreme Court also denied relief, so perhaps Hazen will claim those Justices, too, were biased against her.

Hazen does not explain why the same trial court appointed her as temporary administratrix in the first place, if he was so biased against her. Moreover, Hazen does not explain why she never asked for leave of court to conduct discovery, commence prosecution of the case, or otherwise fulfill her fiduciary duties as temporary administratrix. It is Petitioner's failure and her failure alone that precipitated the trial court's rulings, not some unfounded and late rising accusation of bias against the trial judge.

Certainly no issue of constitutional dimension is raised by such claims, founded on nothing more than an adverse result. Hazen received a full and fair hearing of her challenge to the trial judge before an impartial judge appointed for that purpose. That hearing and decision was affirmed by three impartial Justices of the Court of Appeals. The Texas Supreme Court, too, reviewed her challenge and denied relief. The right to a fair hearing of Petitioner's claims has not been abridged.

CONCLUSION

Respondents, Liddell, Sapp, Zivley & LaBoon, Bruce LaBoon and Robert Brown, having demonstrated that Hazen does not challenge dismissal of the case under state law and that Hazen received impartial hearings in the state courts below, respectfully suggest that the rulings of the Texas courts affirming dismissal in the face of these issues are correct, that this Court should deny the Petition for Writ of Certiorari, and that Respondents should have such other and further relief as to which they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 12th day of April, 1996, the foregoing Brief in Opposition was forwarded to all counsel of record in accordance with Supreme Court Rule 29(.3) by serving three copies by depositing the documents with United States Postal Service, with first-class postage prepaid, addressed to the following counsel of record:

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